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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

GROCERY MANUFACTURERS OF AMERICA, INC.,
A Delaware Corporation,

Appellee,

v.

JOSEPH GERACE, Commissioner, New York Department of Agriculture and Markets, and THE NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS,

Appellants,

JOHN R. BLOCK, as Secretary of Agriculture of the United States, and THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, MARGARET M. HECKLER, as Secretary of Health and Human Services of the United States, and THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM OF GROCERY MANUFACTURERS OF AMERICA, INC.

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Appellee, Grocery Manufacturers of America, Inc., pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the portion of the final decree of the Court of Appeals that held the challenged New York law to violate the Supremacy Clause be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

A.

Nature Of The Case

Federal law provides that if a substitute cheese is nutritionally equivalent or superior to the traditional cheese for which it substitutes, it is not an imitation. A cheese substitute that federal law prohibits from being labeled "imitation" must be labeled "imitation" under the challenged New York law (the "labeling provisions"). The Court of Appeals affirmed the District Court's ruling that this provision violates the Supremacy Clause. This brief is in support of the motion to affirm on that issue.

The New York law also requires restaurants serving food containing a substitute cheese that federal law prohibits from being labeled "imitation" to proclaim that such food contains "imitation cheese" on a large prominently posted sign, on the menu and on any container in which such food is served (the "restaurant sign, menu and container provisions"). The Court of Appeals reversed the District Court and held those provisions to be valid. Grocery Manufacturers of America, Inc., an appellee in this appeal, has filed a petition for a writ of certiorari seeking review of those issues. It is docketed in this Court as number 84-1807.

B.

Regulatory Background

(1) APPLICABLE FEDERAL LAW

The labeling of food products shipped in interstate commerce is regulated by the Federal Food, Drug, and Cosmetic Act ("FDC Act"), 21 U.S.C. § 301 *et seq.*, and its implementing regulations set forth in Title 21 of the Code of Federal Regulations. The FDC Act provides that a food which is an "imitation" of another food is misbranded "unless its label

bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated." FDC Act § 403(c) (21 U.S.C. § 343(c)). This provision was enacted to protect consumers against purchasing what they believed to be a traditional food product but which, in fact, was an inferior version of that traditional product. *See Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 230-31 (1943).

Although section 403(c) of the FDC Act uses the term "imitation," it does not define that term. On January 19, 1973, FDA published a notice of proposed rulemaking regarding "Application of Term 'Imitation' ". 38 Fed. Reg. 2138 (1973). (1973. That notice states that when section 403(c) of the Act was adopted in 1938, "Congress was seeking to protect the consumer from uninformed purchase of an inferior substitute product, which could be mistaken for a traditional food product." *Id.* FDA recognized that the term "imitation" connotes an inferior product. *Id.* It also recognized the vast advances in food technology that had created substitute food products that were not inferior to the traditional foods for which they may be substituted. *Id.* In concluding for purposes of its proposed rule that the term "imitation" should be required only for substitute foods that are nutritionally inferior to the foods for which they substitute, FDA stated:

> To apply automatically the term "imitation" to new substitute food products which are not nutritionally inferior would be a disservice to consumers and would be contrary to the common understanding that the word "imitation" connotes inferiority. Section 403(c) of the act would then present a serious obstacle to the development and marketing of modified products with improved nutritional content. Indeed, because of the traditional connotation of inferiority, application of the term "imitation" to a substitute food product which is not inferior could be misleading to the consumer, in violation of section 403(a) of the act.
>
> * * * *

> The consumer, however, must be protected from unwitting purchase of a product which is different, although not inferior, from what he may reasonably expect. * * * Accordingly, in order to avoid "imitation" status, a substitute food product which is not nutritionally inferior must also bear a label which clearly states the common or usual name of the product and which is not false or misleading.

38 Fed. Reg. 2138 (1973).

On August 22, 1973, FDA adopted the proposed regulation for application of the term "imitation." It is codified at 21 C.F.R. § 101.3(e) and provides in part:

> (1) A food shall be deemed to be an imitation and thus subject to the requirements of section 403(c) of the act if it is a substitute for and resembles another food but is nutritionally inferior to that food.
>
> (2) A food that is a substitute for and resembles another food shall not be deemed to be an imitation provided it meets each of the following requirements:
>
> > (i) It is not nutritionally inferior to the food for which it substitutes and which it resembles.
> >
> > (ii) Its label bears a common or usual name that complies with the provisions of § 102.5 of this chapter and that is not false or misleading, or in the absence of an existing common or usual name, an appropriately descriptive term that is not false or misleading. The label may, in addition, bear a fanciful name which is not false or misleading.

The production and labeling of meat food products and poultry products shipped in interstate commerce are regulated by the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq.*, the Federal Poultry Products Inspection Act ("FPPIA"), 21 U.S.C. § 451 *et seq.*, and their implementing regulations which are contained in Title 9 of the Code of Federal Regulations. Both the FMIA and the FPPIA are administered by the United States Department of Agriculture

("USDA"). These statutes regulate the manufacture and labeling of all products sold in interstate commerce that are made wholly or in part from any meat and/or poultry carcass. The FMIA and the FPPIA both contain express preemption provisions that prohibit the imposition of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than those made under" the respective statutes. 21 U.S.C. §§ 467e and 678.

No formal regulation has been issued defining the term "imitation" under either the FMIA or the FPPIA. USDA has, as a matter of policy, adopted FDA's definition of "imitation" as set forth in 21 C.F.R. § 101.3(e), which provides that only foods that are nutritionally inferior to the products for which they substitute are deemed to be "imitation."

(2) THE CHALLENGED NEW YORK "IMITATION" CHEESE LAW

Section 63 of the New York Agriculture and Markets Law (sometimes referred to as the New York imitation cheese statute) requires "imitation" labeling for cheeses it deems to be imitation cheeses and for products containing them. It also provides that whenever cheese or cheese food it deems to be imitation is used in a product which is offered for sale in a food service establishment, a sign in at least three-inch letters must be prominently posted on the premises stating the name of the food and that it contains imitation cheese or imitation cheese food. In addition, the menu must state, in letters equal in size to the product designation, the foods that contain imitation cheese; and whenever "imitation" cheese is placed on the table or otherwise made available, the container must be conspicuously labeled imitation cheese.

The New York statute does not define the terms "imitation cheese" or "imitation cheese food." Nor does it specify whether its requirements apply to meat-food products, such as meat-topped pizza or poultry products.

The New York Department of Agriculture and Markets issued regulations that define the term "imitation" for purposes of the New York imitation cheese statute. N.Y. Adm. Code title 1, part 18 (1983). The New York Department of Agriculture and Markets Commissioner's determination with respect to New York's imitation cheese regulations expressly provides that New York refuses to follow the federal definition of the term "imitation." Hence, although certain alternative cheese products which are nutritionally equivalent or nutritionally superior to their traditional counterparts are not "imitation" cheese under federal law, they are "imitation" products under the New York law. *See* N.Y. Administrative Code at § 18.1(c).

ARGUMENT

THIS APPEAL FROM THE SECOND CIRCUIT'S JUDGMENT THAT FEDERAL LAW PRE-EMPTS THE LABELING PROVISIONS OF NEW YORK'S IMITATION CHEESE LAW PRESENTS NO SUBSTANTIAL QUESTION

By their appeal, appellants seek review of their unsuccessful challenge to the federal law that conflicts with Section 63 of the New York Agriculture and Markets Act and its implementing regulations. The Court of Appeals for the Second Circuit and the District Court rejected appellants' challenge to the federal law. Similarly, the Courts of Appeals for the District of Columbia and Eighth Circuits have previously rejected challenges to the same federal law. *Federation of Homemakers v. Schmidt*, 539 F.2d 740 (D.C. Cir. 1976); *National Milk Producers Federation v. Harris*, 653 F.2d 339 (8th Cir. 1981). The Second, District of Columbia, and Eighth Circuits are the only circuits to consider the validity of this federal law, and their unanimous view upholding the federal law is clearly correct.[1]

Where Congress has either explicitly or implicitly declared that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Moreover, the

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[1] Although the Federation of Homemakers, Inc. has filed an amicus curiae brief opposing the FDA "imitation" regulation, any suggestion that it represents a consensus view of consumer-oriented groups would be unfounded. In fact, the only view of a consumer-oriented group that is contained in the record in this case is the sworn statement of Thomas Blaisdell Smith, Director of Government Affairs of Public Voice for Food and Health Policy (a non-profit consumer research and advocacy organization). Mr. Smith concluded that with respect to products nutritionally equivalent or nutritionally superior to the products for which they substitute, use of the term "imitation" would create rather than avoid consumer confusion.

decisions of this Court have firmly established that even if Congress has not foreclosed state regulation in a particular area, state law is pre-empted to the extent that it actually conflicts with federal law. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983). As this Court stated in *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, ___, 78 L.Ed.2d 443, 452 (1984), state law actually conflicts with federal law "when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L.Ed. 581, 61 S.Ct. 399 (1941)." The above applies to both statutes and regulations. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. ___, ___, 81 L.Ed.2d 580, 589 (1984). "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).[2]

In the present case there can be no serious question about the fact that the labeling requirements of the New York

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[2] This Court's recent decision in *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 53 U.S.L.W. 4612 (U.S. June 3, 1985) is not to the contrary, and Federation of Homemakers, Inc.'s reliance on that case in its Amicus Curiae Brief is misplaced. *Hillsborough* involved a county ordinance regulating plasmapheresis that did *not* conflict with federal regulations. Pre-emption was claimed on the basis of an implicit intent to occupy the field because of the comprehensiveness of the federal regulations, even though FDA had specifically stated that its regulations for licensing of plasmapheresis facilities were "not intended to usurp the powers of State or local authorities to regulate plasmapheresis procedures in their localities." 53 U.S.L.W. at 4613. In the present case, pre-emption was found not on the basis of an attempt to occupy the field, but on the basis of an actual conflict between the New York and federal laws.

imitation cheese law conflict with federal law. Indeed, the New York Department of Agriculture and Markets Commissioner's determination with respect to the New York imitation cheese regulations expressly provides that New York refuses to follow the federal definition of the term "imitation," and expressly provides that certain labels approved by USDA will not comply with the New York law. The Court of Appeals described this conflict as follows:

> [A]s applied to alternative cheese, *the New York labeling scheme is in direct conflict with its federal counterpart.* Including the term imitation on the label of a nutritionally superior alternative cheese in order to comply with New York law, would render the product misbranded under federal law. *Compliance with both the state and federal requirements is impossible.*

755 F.2d at 1001; 16a (emphasis added).[3]

Similarly, the District Court stated:

> [I]f a manufacturer complies with the New York statute, the manufacturer would, at the same time, violate the federal regulations and would therefore be subject to sanctions under the federal statute for misbranding. In short, *compliance with both regulations is impossible.*

581 F. Supp. at 668; 47a (emphasis added).

Appellants do not seem to seriously challenge the existence of a conflict between the federal law and the challenged New York law.[4] Instead, they attack the validity of the federal regulation.

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[3] " a" refers to the Appendix to the Jurisdictional Statement.

[4] Appellants make a single unsupported statement that the language of the federal regulations does not demonstrate unavoidable conflict with the New York law. (Jurisdictional Statement p. 22). But, as both the District and Appellate Court recognized, the conflict plainly exists and is unavoidable. Neither appellants' Jurisdictional Statement nor the Amicus Curiae Brief of the Federation of Homemakers, Inc. explains how the federal law and the challenged New York law can both exist without being in conflict.

In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. ____, 81 L.Ed.2d 580 (1984) this Court discussed the established standard for judicial review of the federal regulation. Quoting from *Fidelity Federal Savings and Loan Assn. v. de la Cuesta*, 458 U.S. 141 (1982) this Court stated:

> "Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' " *Id.*, at 153-154, 73 L Ed 2d 664, 102 S Ct 3014 quoting *United States v. Shimer*, 367 US 374, 383, 6 L Ed 2d 908, 81 S Ct 1554 (1961).

Capital Cities Cable, Inc. v. Crisp, 467 U.S. at ____, 81 L.Ed.2d at 589.

In addition to the Second Circuit in this case, two other circuits have considered challenges to FDA's "imitation" regulation (21 C.F.R. § 101.3(e)). All three circuits have found the regulation to be within the scope of matters that Congress has committed to FDA's discretion, to be reasonable, and to be valid. *Federation of Homemakers v. Schmidt*, 539 F.2d 740, 743-744 (D.C. Cir. 1976); *National Milk Producers Federation v. Harris*, 653 F.2d 339, 343 (8th Cir. 1981). In short, all three circuits have found FDA's imitation regulation to satisfy the elements of the test that this Court set forth in *Fidelity Federal Savings and Loan Assn. v. de la Cuesta*, 458 U.S. 141 (1982). Moreover, FDA's "imitation" regulation has been in existence since 1973, and the fact that Congress has not sought to alter or otherwise condemn the regulation indicates Congress has acquiesced. *See, e.g., United States v. Rutherford*, 442 U.S. 544, 554 (1979); *Haig v. Agee*, 453 U.S. 280, 300 (1981).

Appellants erroneously contend that the federal regulation defining "imitation" is contrary to this Court's decisions in *62 Cases of Jam v. United States,* 340 U.S. 393 (1951) and *Federal Security Administrator v. Quaker Oats,* 318 U.S. 218 (1943). They incorrectly argue that those cases require "imitation" labeling if a product contains a less expensive ingredient, regardless of the quality of the product.

In *Federal Security Administrator v. Quaker Oats,* 318 U.S. 218 (1943), this Court recognized FDA's authority to protect consumers from being mislead into believing that inferior products were the same as a standardized product. Although the Court spoke of economic adulteration by which less expensive ingredients were substituted, it did so only in the context of instances where the substitution made the product inferior to the standardized product. *Id.* 318 U.S. at 230. Subsequently, in *62 Cases of Jam v. United States,* 340 U.S. 593 (1951), a gelatinized solution consisting largely of water had been substituted for a substantial portion of the fruit required by the standard of identity for fruit jam. *Id.* at 594-595. The Court stated that the product was inferior to the standardized fruit jam, and labeling it imitation would connote precisely what the product was—a preserve inferior to the standardized fruit preserve. *Id.* at 600.

The federal regulations defining "imitation" also focus on the quality of the product. If a substitute cheese is nutritionally equivalent or superior to the traditional cheese for which it substitutes, it must be labeled in a manner that is not false or misleading but does not bear the disparaging term "imitation." If it is nutritionally inferior, it is labeled "imitation." The D.C. Circuit recognized that FDA's imitation regulation encourages the manufacture of nutritional food products and better informs consumers so that they may exercise a knowledgeable choice of differing foods within general categories; it is well within the zone of reasonableness needed for agency rulemaking and well within the bounds of discretion which FDA may exercise. *See,*

Federation of Homemakers v. Schmidt, 539 F.2d 740 at 743-744 (D.C. Cir. 1976). The Eighth Circuit concurred, *National Milk Producers Federation v. Harris*, 653 F.2d 339, 343 (8th Cir. 1981), as did the Second Circuit in this case. 755 F.2d at 1001; 15a-16a. The unanimous view of those circuits is clearly correct and the questions raised by appellants' challenge to FDA's regulations are so unsubstantial as not to warrant further argument.

CONCLUSION

Wherefore, Appellee, Grocery Manufacturers of America, Inc., respectfully submits that the questions raised by Appellants are so unsubstantial as not to warrant further argument and respectfully moves this Court to affirm the judgment of the Court of Appeals for the Second Circuit with respect to its holding that the labeling provisions of the New York law are pre-empted by federal law and therefore invalid.

Respectfully submitted,

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